

1 Brian Nester (*pro hac vice*)
2 bnester@sidley.com
3 Michael R. Franzinger (SBN 222155)
4 mfranzinger@sidley.com
5 Anna M. Weinberg (*pro hac vice*)
6 aweinberg@sidley.com
7 SIDLEY AUSTIN LLP
8 1501 K Street, N.W.
9 Washington, D.C. 20005
10 Telephone: (202) 736-8000
11 Facsimile: (202) 736-8711

Richard A. Cederoth (*pro hac vice*)
rcederoth@sidley.com
David C. Giardina (*pro hac vice*)
dgiardina@sidley.com
SIDLEY AUSTIN LLP
One South Dearborn Street
Chicago, Illinois 60603
Telephone (312) 853-7000
Facsimile: (312) 853-7036

7 Mike Bettinger (SBN 122196)
8 mbettinger@sidley.com
9 SIDLEY AUSTIN LLP
10 555 California Street
11 Suite 2000
12 San Francisco, CA 94104
13 Telephone: (415) 772-1200
14 Facsimile: (415) 772-7400

15 Attorneys for Plaintiffs
16 ASUS COMPUTER INTERNATIONAL,
17 ASUSTEK COMPUTER INCORPORATED

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ASUS COMPUTER INTERNATIONAL; and
ASUSTEK COMPUTER INCORPORATED,

Case No. 15-cv-01716-BLF

Plaintiffs,

**ASUS'S UPDATE RE: MOTION TO
STRIKE PORTIONS OF EXPERT
REPORTS**

vs.
INTERDIGITAL, INC.; INTERDIGITAL
COMMUNICATIONS, INC.; INTERDIGITAL
TECHNOLOGY CORPORATION; IPR
LICENSING, INC. and INTERDIGITAL
PATENT HOLDING, INC.,

Hearing Date: January 17, 2019
Time: 9:00 a.m.
Location: Courtroom 3, 5th Floor
Judge: Hon. Beth Labson Freeman

Defendants.

1 Pursuant to the Court’s Orders on August 6 and 31, 2018 (ECF Nos. 226, 255), Plaintiffs
 2 (“ASUS”) provide this update to their Motion to Strike Portions of Expert Reports or, in the
 3 Alternative, to Supplement Fact and Expert Discovery (“Motion”), filed August 2, 2018 (ECF No.
 4 220). The Court referred ASUS’s alternative request to supplement fact and expert discovery to
 5 Magistrate Judge Cousins, while retaining jurisdiction over any issues that remained after he ruled
 6 on the alternative relief. (ECF No. 226.) Magistrate Judge Cousins granted ASUS leave to
 7 supplement expert reports but denied supplemental fact discovery (document production and
 8 depositions). (ECF No. 247.) The portion of ASUS’s Motion relating to InterDigital’s “unwilling
 9 licensee” defense has been resolved by agreement between the parties. There remains one issue for
 10 the Court to decide, namely whether to strike the references to a pair of documents produced after
 11 the close of fact discovery in two expert reports served by Defendants (“InterDigital”).

12 The remaining issue in this Motion presents a simple and straightforward question: whether a
 13 party’s experts should be permitted to rely on significant new documents the party injected into the
 14 case after the fact discovery cutoff date. The simple and straightforward answer is no. Courts
 15 routinely preclude parties from relying on documents they introduced after the fact discovery cutoff,
 16 including where the party did not create the documents until after the cutoff. *See, e.g., Jones v.*
 17 *Travelers Cas. Ins. Co. of Am.*, 304 F.R.D. 677, 678, 683 (N.D. Cal. 2015); *see also TCL Commc’n*
 18 *Tech. Holdings, Ltd. v. Telefonaktiebolaget LM Ericsson*, No. SACV1400341JVSANX, 2016 WL
 19 6921126, at *3 (C.D. Cal. May 24, 2016) (rejecting producing party’s attempt to rely on new alleged
 20 FRAND offer made two months *before* the fact discovery cutoff).

21 The documents at issue are InterDigital’s license offer letter and corresponding internal
 22 financial model dated April 12, 2018. InterDigital’s counsel represented to Magistrate Judge Cousins
 23 that it intends these documents to be an important part of its case. (ECF No. 242, audio file at 7:36-
 24 7:39.) By creating and producing the documents after fact discovery ended and during the expert
 25 discovery period, InterDigital alters the case’s foundation, when it is too late for ASUS to take the
 26 discovery it is entitled to. InterDigital chose to introduce these documents into the litigation record
 27 nearly a month after the March 16 fact discovery cutoff, and it has done nothing to justify the
 28 untimeliness of these documents. *See* ECF No. 142 (setting fact discovery cutoff date). It was

1 entirely within InterDigital’s capabilities to craft this offer letter and model while fact discovery was
 2 ongoing, if it wanted to make them a part of this case. Whether InterDigital’s motive was to shield
 3 itself from discovery, to drag out negotiations while it continues to collect royalties, or both,
 4 InterDigital’s strategic delay should not be rewarded.

5 Expert discovery is supposed to be conducted on a “locked-in … factual record” for which
 6 the parties have had the opportunity to “test the factual basis[.]” *See Apple, Inc. v. Samsung Elecs.*
 7 *Co.*, No. 11-CV-01846-LHK, 2012 WL 3155574, at *5 (N.D. Cal. Aug. 2, 2012). ASUS has not had
 8 the opportunity to “test the factual basis” of this important portion of InterDigital’s case. Had the
 9 documents been produced on time, ASUS could have asked InterDigital fact witnesses about them
 10 during their depositions. Instead, ASUS will now be surprised by what the fact witnesses say about
 11 these documents at trial. Especially now that ASUS’s request to take follow-up fact discovery has
 12 been denied (ECF No. 247), striking the late-produced documents and the experts’ reliance on them
 13 is a matter of fundamental fairness and orderly trial preparation. The parties may continue their
 14 negotiations toward a possible resolution of their dispute, but the negotiations over which this case
 15 will be litigated need a reasonable end point, which the fact discovery cutoff provides.

16 To be clear, ASUS does not believe InterDigital’s new documents cure, or even mitigate, its
 17 ongoing breach of contract and other violations. But they do affect the arguments about how those
 18 violations occurred. Even with a chance to supplement expert reports, ASUS never got the
 19 opportunity to cover these documents in its fact depositions, interrogatories, or follow-up document
 20 requests. Moreover, allowing the documents in would reward InterDigital’s selective application and
 21 waiver of privilege. *See Motion at 6-7 (ECF No. 220); Joint Statement Re: Plaintiffs’ Motion for*
 22 *Leave to Supplement Fact and Expert Discovery at 1-3 (ECF No. 237).* InterDigital’s tactic of
 23 withholding models and deposition answers about them as privileged, then producing a selected one
 24 tailored to the case it wants to present after there is no longer an opportunity to depose witnesses on
 25 it, deprives ASUS of a fair opportunity to fully litigate the issues raised by the documents.

26 For the reasons stated above and in the Motion, ASUS respectfully requests that the Court
 27 strike opinions connected to the letter and licensing model produced after the close of fact discovery.
 28 *See Motion at 3:21-24, 3:27-28 (listing the portions of reports ASUS seeks to strike).*

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2 DATED: October 1, 2018

3 By: /s/ Michael R. Franzinger

4 Brian Nester (*pro hac vice*)

5 Michael R. Franzinger

6 Anna M. Weinberg (*pro hac vice*)

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11 *Attorneys for Plaintiffs*

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